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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 501 F. 2d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1974 (Pet. App. B). On September 23, 1974, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc*

(Pet. App. C). By order of October 15, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 22, 1974, on which date the petition was filed. Certiorari was granted on January 20, 1975 (App. 51). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Two government witnesses were cross-examined regarding statements allegedly made by them to an investigator employed by defense counsel, which statements were inconsistent with their identification of respondent as one of the participants in a bank robbery. They denied having made such statements. During the defense case, defense counsel proposed to call the investigator to testify to his conversations with the witnesses, with the intent of thereby impeaching the witnesses' testimony. The investigator's report, prepared after his interview of the witnesses, contained statements purporting to report or reflect what the witnesses had said to him.

The question presented is whether, in these circumstances, the trial court has discretion to condition the defendant's right to present the investigator's impeaching testimony upon production to the prosecution of the portions of the investigator's report relating to the statements purportedly made by the government witnesses to the investigator.

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. 18 U.S.C. 3500 (the Jencks Act) provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

3. Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

(b) OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES

* * * Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) DISCOVERY BY THE GOVERNMENT

If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by

prospective government or defense witnesses, to the defendant, his agents or attorneys.

* * * * *

(f) TIME OF MOTIONS

A motion under this rule may be made only within 10 days of arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

4. Rule 612 of the Federal Rules of Evidence provides:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any por-

tion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

5. Rule 613 of the Federal Rules of Evidence provides in pertinent part:

(a) Examining witness concerning prior statement.—In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent and two others [1] were convicted of bank robbery, in violation of 18 U.S.C. 2113(a), and assault with a dangerous weapon in the commission of the robbery, in violation of 18 U.S.C. 2113(d). Each

[1] Indicted, tried, and convicted with respondent were Tommie Louis Brown and Virgil David Swain. A fourth suspect, Jonathan Ray Nobles, was also indicted but was a fugitive at the time of trial.

defendant was sentenced to a term of twenty-five years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2) (App. 48-49). Over the dissent of one judge, the court of appeals reversed respondent's conviction and ordered a new trial (Pet. App. A; 501 F. 2d 146).[2]

1. On the morning of February 6, 1973, at approximately 11:30 a.m., four men entered and robbed a branch of the Crocker National Bank in Los Angeles, California (Tr. 13-25, 185-186). One, identified as co-defendant Brown, jumped behind the tellers' windows and moved down the line of cages, collecting a total of $4,031 from the cash drawers (Tr. 18-20, 187-194). Meanwhile, brandishing weapons and guarding the customers and bank employees from various positions in the bank, the other three men ensured that no one would interfere with Brown's labors. Armed with a revolver, the man identified as respondent performed his part in the robbery while standing directly beneath the bank's automatic surveillance camera and thus was the only one of the robbers whose activities in the bank were not captured on film for the jury to view (Tr. 22-23, 192-194, 323-324).

Accordingly, the evidence against respondent at trial consisted exclusively of the testimony of two eye witnesses, Peter Van Gemeren, a bank teller (Tr. 22-23) and Gary Hoffman, a salesman visiting the bank (Tr. 323-325, 420-421). Van Gemeren testified

[2] The court unanimously affirmed the convictions of Brown and Swain.

that during the robbery he observed respondent for approximately one minute from a distance of twenty feet and that he gave a detailed description of him to the F.B.I. (Tr. 61-62). Hoffman testified that he observed respondent standing beneath the surveillance camera (App. 17; see also Tr. 416) and that he focused his attention on respondent for a full two or three minutes, one-third of the time that the robbery was in progress (App. 18-19). Hoffman also gave a description to the F.B.I. (Tr. 329). Hoffman further testified that, prior to trial, he identified respondent from a photographic array and at a police lineup (Tr. 328-331, 420-421). While respondent presented an affirmative defense of alibi, his strongest defense, as the court of appeals noted (Pet. App. 6a), was his attempt to discredit the testimony of Van Gemeren and Hoffman.

2. During his cross-examination of Van Gemeren, respondent's counsel asked the witness whether he recalled being interviewed by an investigator from the Public Defender's office, John Bond (App. 11). The witness was unsure whether such an interview had taken place and, if it had, of the nature of his response to questions that may have been asked in the interview (*ibid.*). The government thereupon requested, and respondent's counsel agreed, that the witness be allowed to examine his alleged statement for the purpose of refreshing his recollection (*ibid.*). However, the statement was not in fact shown to the witness during the overnight recess.

When the trial resumed the following morning, respondent's counsel asked Van Gemeren whether it was not a fact that he had told the defense investigator that he had seen only the back of the robber who had been standing under the surveillance camera. Van Gemeren did not recall having so stated (App. 12). Government counsel again requested that the witness be allowed to refresh his recollection by reviewing the prior statement that he allegedly had given to the investigator (*ibid.*).

Counsel for respondent then stated that he had reconsidered his previous consent to allow Van Gemeren to examine the alleged statement (App. 12-13): "I had agreed to that, Your Honor, and after saying that yesterday, I talked it over with several other attorneys in our office. It is our position that we do not have to do that because I am only trying to use this interview for impeachment purposes." The court ordered counsel to allow the witness to examine the purported statement (App. 13). Counsel then tore off a strip of paper from his investigator's report, showed it to the court,[3] and had it marked as Defense Exhibit A for identification (App. 13-14).

After Van Gemeren examined the paper, he testified that it refreshed his recollection but that he still did not recall having told the investigator that he had seen only the back of the robber standing under the

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[3] The piece of paper was also shown to the prosecutor, who found it "unintelligible" (App. 14). It was not subsequently introduced in evidence and was not thereafter available to the prosecutor.

surveillance camera (App. 15). He further testified, in response to a question from respondent's counsel, that in fact he had not seen only the back of the robber under the camera (*ibid.*).

3. During defense counsel's cross-examination of Hoffman, the following colloquy occurred regarding a telephone conversation that Hoffman had had with the same Public Defender's office investigator, John Bond (App. 20):

> [RESPONDENT'S COUNSEL:] And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?
>
> [THE WITNESS:] I don't believe I indicated that to him.
>
> [RESPONDENT'S COUNSEL:] You do not recall stating that to Mr. Bond?
>
> [THE WITNESS:] No, I do not.
>
> [RESPONDENT'S COUNSEL:] That all blacks look alike?
>
> [THE WITNESS:] No, I do not, sir.

At the bench, the prosecutor requested respondent's counsel to furnish him with "a copy of any interview, notes or recorded statements" of Hoffman's purported statements to Bond for use in redirect examination of Hoffman (*ibid.*). Respondent's counsel refused to allow the prosecutor to inspect them, but the court indicated that, in the absence of legal authority precluding such inspection, it would require disclosure (App. 21):

> It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

After hearing argument on the motion for production of portions of the report, the court modified its ruling. It narrowly defined the issue before it (App. 24-25), concluded that Rule 16 of the Federal Rules of Criminal Procedure applies only to pre-trial discovery and was thus inapplicable (App. 25), and then ruled as follows (App. 24, 26-27):

> * * * First of all, the Court is not going to order disclosure of this memorandum at this time. At the present time there has been no impeachment and will be no impeachment until the investigator takes the stand and testifies as to the allegedly impeaching statements.
>
> Therefore, the issue will not arise until the investigator does take the stand. The issue thereafter will be whether or not for utilization for impeachment purposes the government should be entitled to examine the memorandum made by the investigator, presumptively concurrently with his inquiry of the allegedly impeached witness for purposes of furthering the government's cross-examination.
>
> * * * * *
>
> * * * [T]he government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr.

Hoffman's testimony relative to his inability to distinguish between people of the black race.

And if he does make such a statement, if he * * * [Mr. Bond] make[s] such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony.

* * * The issue, of course, may not arise. It is dependent upon whether or not Mr. Bond is called to testify, but that is the Court's view at this time.

* * * * *

I will say this to assist you, Mr. Allis [respondent's counsel], while I think about it. I am sure there are no statements by any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda you may have.

It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature.

I am specifically concerned only with the Hoffman statement of Mr. Bond.

4. As part of the defense case, counsel for respondent called John Bond as a witness, without first indicating whether he intended to comply with the

court's previous ruling regarding production of portions of Bond's investigative report (App. 29-30). When the court requested an offer of proof as to Bond's testimony, respondent's counsel stated that Bond would impeach the testimony of witnesses Van Gemeren and Hoffman (App. 30),[4] but that the defense would not turn over these witnesses' statements following Bond's direct testimony (*ibid.*). The court reiterated its prior ruling (App. 30-33) and stated that, in the absence of disclosure of the relevant portions of the investigative report, Bond would not be permitted to testify regarding his interviews with Van Gemeren and Hoffman (App. 30-31, 33, 36). Bond then testified concerning some photographs that he had taken at the bank, but, pursuant to the court's order, he was not asked to impeach the identification testimony of Hoffman or Van Gemeren (see Tr. 529-556).

5. Respondent was convicted and on appeal contended that the district court's ruling violated his privilege against self-incrimination, denied him the right of cross-examination, and was contrary to the limitations contained in Rule 16 of the Federal Rules of Criminal Procedure.

A divided court of appeals reversed. The majority found prejudicial error in conditioning impeachment upon disclosure to the prosecutor of portions of the investigative report, even though the excerpts would

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[4] A written offer of proof was filed with the court under seal (see App. 33) and was supplemented by oral representations of defense counsel. App. 34-35.

only be used as an aid to cross-examination by the government. The court held that requiring production to the government of those portions of Bond's report relating to conversations about which Bond sought to testify during trial would violate respondent's Fifth Amendment privilege against compulsory self-incrimination (Pet. App. 9a-14a). Moreover, although the disclosure would not take place until after the government had completed its case in chief at trial, the court deemed the required production of the excerpts from the investigator's report to be a violation of Rule 16(c)'s limitation on prosecutorial discovery in criminal cases (Pet. App. 15a-18a).[5]

The dissenting judge, proceeding essentially on the premise that "[t]he purpose of a trial is to develop the truth, not suppress it" (Pet. App. 22a), concluded that there was no error in requiring a witness called for impeachment purposes to produce the notes that he made on the subject of impeachment and that form the basis of his testimony. Relying in part on *Harris* v. *New York*, 401 U.S. 222, the dissenting judge concluded that the Fifth Amendment's privilege against self-incrimination did not bar the trial court from ordering disclosure (Pet. App. 22a). He also found that the majority's reliance on Rule 16, which governs pretrial discovery, and on the Jencks Act, 18 U.S.C. 3500, was misplaced (Pet. App. 24a). "Our problem," he wrote, "centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment" (*ibid.*).

[5] The court specifically held that the investigator's report was not protected by the attorney-client privilege (Pet. App. 7a-9a).

SUMMARY OF ARGUMENT

1. The trial court's order—that defense investigator Bond could not testify about alleged prior inconsistent statements of government witnesses unless the prosecution were allowed to examine the portions of the investigator's report relating to Bond's interviews of the two witnesses—was eminently sensible and fair. It was necessary and proper to advance the truth-seeking function of the criminal trial by providing the prosecution with the material most likely to be pertinent in cross-examining the witness and testing the accuracy of his recollection of the interviews. The court's order did no more than to put the prosecution on an equal footing in this particular respect with the defense, which obtains copies of statements of government witnesses under the Jencks Act (18 U.S.C. 3500) in similar situations.

As the dissenting judge said (Pet. App. 22a), "[t]he purpose of a trial is to develop the truth, not suppress it." In our legal system this goal is thought to be fostered by the adversary nature of the criminal trial itself, and particularly by the opportunity for effective cross-examination. Thus, the order of the trial court was fully consistent with the view of this Court that "[t]he need to develop all relevant facts in the adversary system is both funda-

mental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 24.

In the absence of a recognized privilege shielding disclosure, it follows that a trial court, as a part of its continuing responsibility to rule on matters of evidence, has discretionary power during trial to order a witness or a party to produce for inspection documents in his possession relating to the subject matter of the witness's testimony at trial. See, *e.g.*, *Goldman* v. *United States*, 316 U.S. 129, 132; *Gordon* v. *United States*, 344 U.S. 414, 420; *Jencks* v. *United States*, 353 U.S. 657, 669; *Palermo* v. *United States*, 360 U.S. 343, 353. Moreover, there was no burden on the prosecution to establish in advance that Bond's report would in fact have been inconsistent with his testimony. "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness" (*Jencks* v. *United States*, *supra*, 353 U.S. at 669), as clearly it did here.

Moreover, the trial court exercised its discretion with great care by limiting its disclosure order to those portions of the investigator's report relating to the proffered testimony of Bond regarding his interviews with Van Gemeren and Hoffman, by not requiring disclosure until after Bond's direct testimony, and by indicating that the irrelevant portions

of the report could be excised prior to disclosure to the prosecution. Thus, absent the existence of a recognized privilege, it was an appropriate exercise of inherent power for the trial court to order production of the relevant portions of the investigator's report.

The trial court's disclosure order also was consistent with the provisions of the new Federal Rules of Evidence (Pub. L. 93-595), which will go into effect on July 1, 1975. Rule 613(a), by making mandatory the disclosure to opposing counsel of alleged prior statements of a witness whenever the witness is cross-examined about such statements, would have required the disclosure to the prosecutor of the purported statements of Van Gemeren and Hoffman at the time respondent's counsel interrogated them about their statements to Bond. Rule 612 would have permitted the court to require production of the relevant portions of Bond's report during or after his direct testimony, assuming that Bond had used the report to refresh his recollection before or while testifying. Thus, the adoption of the new Federal Rules of Evidence lends further support to the wisdom of the discretionary action of the trial court in this case.

2. Despite the fact that the trial court's order furthered the search for the truth, the court of appeals concluded that it violated respondent's privilege against self-incrimination. We submit, however, that the Fifth Amendment privilege does not shield the report from production in these circumstances.

The portions of the investigator's report ordered disclosed are not the kind of material within the ambit of the privilege, because they are neither personal to respondent nor testimonial in nature. Respondent did not prepare Bond's report, nor did the portions of the report ordered disclosed reflect any information from or ideas of the respondent. Moreover, while the portions of a written report relating to witness interviews might, in the abstract, be considered "testimonial" in character, they are not "testimonial" with reference to respondent—the only relevant sense in considering his claim of privilege. He neither gave the interviews nor prepared the report.

In any event, respondent was not actually compelled to produce the report and did not in fact produce it. While it is true that the court conditioned respondent's right to adduce the impeaching testimony from the investigator on production of the report, that action involved no impermissible compulsion in the Fifth Amendment sense. The court's order no doubt posed a difficult choice for respondent—either to call the investigator as a witness at trial on the condition that his report be disclosed and risk effective impeachment of his testimony,[6] or to forego the introduction of that testimony from the investigator—but the choice was respondent's freely

[6] For purposes of the Fifth Amendment analysis, it must be assumed that the report was in fact inconsistent with the testimony Bond would have given; otherwise, its disclosure would not have tended to incriminate respondent.

to make as a matter of trial strategy and did not create the kind of compulsion against which the Fifth Amendment protects. See *McGautha* v. *California*, 402 U.S. 183, 213; *Williams* v. *Florida*, 399 U.S. 78.

Moreover, even if the material in the investigator's report were otherwise within the Fifth Amendment privilege, the privilege was waived when respondent offered the investigator as a witness in his behalf. By choosing to tell his side of the story through the investigator's testimony, respondent waived his Fifth Amendment privilege not only as to the part of the story he wished the jury to hear, but as to the whole story. See *Harris* v. *New York*, 401 U.S. 222, 226; *Brown* v. *United States*, 356 U.S. 148, 155-156; *Raffel* v. *United States*, 271 U.S. 494. For one cannot "claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, *supra*, 402 U.S. at 215.

Finally, we note that there is virtually no precedent supporting the holding of the court of appeals that the trial court's production order violated respondent's Fifth Amendment privilege. Two of the cases on which the court placed primary reliance relate to the entirely different question of pre-trial discovery, and both took pains to distinguish the situation in which the defendant elected to take the stand at trial, recognizing the need for full inquiry and thorough cross-examination in such circumstances. *Prudhomme* v. *Superior Court of L.A. County*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr.

129; *United States* v. *Fratello*, 44 F.R.D. 444 (S.D. N.Y.). The third case, *United States* v. *Wright*, 489 F.2d 1181 (C.A.D.C.), did deal with a factual situation like that presented by this case, but its Fifth Amendment discussion was not the basis for decision.

To the extent that the Fifth Amendment was implicated in *Wright*, the court there, as here, was concerned that disclosure of an investigator's report would undermine the "preference for an accusatorial rather than an inquisitorial system of criminal justice" and the requirement that "the government in its contest with the individual * * * shoulder the entire load." *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55. However, these values are not infringed in this case, because the order of the trial court did not require production of the relevant portions of the investigator's report until after the government had put on its entire case in chief and withstood a motion for judgment of acquittal, and after the defense had called Bond as a witness and completed its direct examination of him.

3. The court of appeals also examined the district court's production order from the perspective of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act (18 U.S.C. 3500). Neither, we submit, has any bearing on the issue presented in this case. We do not rely upon the affirmative authorization in Rule 16(c) as a basis for the trial court's production order; indeed, we think Rule 16(c) is entirely irrelevant. The question here is not one of reciprocal discovery, and the pertinent portion of

the investigator's report did not comprise material the defendant "intends to produce at the trial." Most importantly, this case is not concerned with pre-trial discovery. Once trial has commenced the function of Rule 16 is ended; the rule neither authorizes nor precludes in-trial production or use of witnesses' statements for impeachment purposes.

As for the Jencks Act, it relates only to in-trial disclosure to the defense of statements of government witnesses, and it was intended to limit (rather than define or expand) the discretion of trial judges in ordering such disclosure. In the absence of a comparable statutory limitation upon disclosure of statements to the prosecution, final decision as to such matters remains in the sound discretion of the trial court.[7] Cf. *Gordon* v. *United States*, *supra*, 344 U.S. at 418; *Palermo* v. *United States*, *supra*, 360 U.S. at 353.

In sum, the decision of the court of appeals has improperly required the exclusion of relevant evidence essential to a fair testing of the credibility of the defense investigator's testimony. As Mr. Justice Frankfurter observed in *Nardone* v. *United States*, 308 U.S. 338, 340, "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an overriding public policy expressed in the Constitution or

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[7] Considerations of due process might inhibit authorization of greater disclosure to the prosecution than is permitted to the defense, but no such element of inequality is involved here.

the law of the land." No such justification can be demonstrated here.

ARGUMENT

I. THE ORDER TO DISCLOSE RELEVANT PORTIONS OF THE INVESTIGATOR'S REPORT CONSTITUTED A SOUND EXERCISE OF THE TRADITIONAL, APPROPRIATE AND NECESSARY POWERS OF THE TRIAL COURT OVER THE CONDUCT OF A TRIAL.

A. Disclosure Was Necessary to Facilitate Cross-Examination of the Investigator and Further the Truth-Seeking Goal of the Trial.

Respondent's counsel asked government witnesses Van Gemeren and Hoffman, eye witnesses to the robbery, whether the former had told defense investigator Bond that he only saw the back of the robber identified by him as respondent, and whether the latter had said to Bond that all blacks looked alike to him. During this cross-examination, however, respondent's counsel refused to disclose portions of a report of the investigator containing statements of these witnesses, except for a portion of a purported statement of Van Gemeren. Thereafter, respondent's counsel sought to impeach the credibility of the two witnesses by offering testimony from Bond about the prior statements of the government witnesses.

The district court ruled that if the investigator testified about the prior statements, the government could examine that portion of the report prepared by the investigator relating to the statements made to him by the two witnesses and that the court would first examine the memorandum *in camera*, if necessary, to excise any extraneous matter. Otherwise,

the court ruled, the investigator could not testify about these alleged statements. Respondent's counsel declined to produce the report and thereby did not elicit such testimony from the investigator.

This ruling by the district court was eminently sensible and fair. The judicial process, whether in the context of a civil or a criminal case, is a search for truth and not a "sporting contest" between the two sides. See, *e.g.*, *Williams* v. *Florida*, *supra*, 399 U.S. at 82; Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279. The accomplishment of that ultimate goal is fostered by "disclosure, rather than suppression, of relevant materials" (*Dennis* v. *United States*, 384 U.S. 855, 870) and by the adversary nature of the process itself. The process contemplates examination and vigorous cross-examination in open court of the witnesses to the events in question, in an effort to enable the jury properly to weigh the credibility, demeanor, ability to recall, and opportunity to observe of the various witnesses and thereby to arrive at the truth. *See*, *e.g.*, Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 Cornell L.Q. 239, 256-257 (1967). The existence of an adequate opportunity to test the credibility of the witnesses who take the stand is in turn crucial to the reliability and success of this process.

To assist the jury in assessing credibility and in ascertaining the "whole truth," our system of justice provides for the confrontation of each witness offered—even the defendant in a criminal trial, should

he choose to testify—by opposing counsel. The witness's credibility is put to searching test under fire of cross-examination, and judges and lawyers have therefore long regarded the opportunity to cross-examine "as an essential safeguard of the accuracy and completeness of testimony." McCormick, *Evidence*, § 19, p. 43 (1972). See also *Smith* v. *Illinois*, 390 U.S. 129; Ladd, *supra*, 52 Cornell L.Q. at 258.

Because the purpose of cross-examination is to explore those factors that determine whether testimony is believable—perception, memory and narration of the witness—probably the most effective and most frequently employed method of attacking a witness's credibility is by proof that the witness on a previous occasion has made a statement inconsistent with his present testimony. McCormick, *supra*, at § 33, p. 66 and n. 1. As McCormick further states (*id.* at § 34, p. 68):

> The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements.

It is this doubt concerning the truthfulness or accuracy of the statements made by Van Gemeren and Hoffman that respondent sought to raise by cross-examining them about their interviews with the defense investigator, Bond. Had respondent been permitted by the trial court to proceed as he intended,

he would then have attempted to reinforce the doubt thereby created by calling Bond to the witness stand and "completing the impeachment" through Bond's testimony that he had interviewed Van Gemeren and Hoffman prior to trial and that they had in fact made statements to him inconsistent with their trial testimony.[8]

Having himself thus exploited the truth-seeking devices of cross-examination and impeachment by prior inconsistent statement to create doubt about the credibility of the two key government witnesses, respondent nevertheless demands the right to deprive the government of the effective use of the same tools by denying it the opportunity to impeach his witness, Bond, with his prior inconsistent statements (if the report was inconsistent with his trial testimony) and to rehabilitate the government's own witnesses by showing that their trial testimony may not have been inconsistent with their statements to the investigator, as the defense claimed it was. The trial court prop-

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[8] As noted (*supra*, note 4), we have not been privy to the written offer of proof concerning Bond's proffered testimony, which was filed with the court under seal. The thrust of counsel's oral representations (App. 33-34) indicates that Bond would have testified that the prior statements of Van Gemeren and Hoffman were inconsistent with their trial testimony. However, no representation was made as to whether the report would confirm that testimony, and the dissenting judge in the court of appeals inferred that it would not, stating (Pet. App. 22a) that "the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it."

erly recognized the essential unfairness of this approach (App. 21):

> It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

Two observations are pertinent. First, the defense intended to open up the issue of the prior statements made by the government witnesses to its investigator while at the same time restricting the right of the government to cross-examine the defense witness effectively. Second, if the statements as recorded by Bond contained no reference to the impeaching inconsistencies about which he planned to testify, disclosure would have cast grave doubt indeed on the accuracy of the investigator's testimony that those prior inconsistent statements had actually been made to him.[9] As this Court said in *Jencks* v. *United States*, 353 U.S. 657, 667:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is

[9] If the report conformed to the investigator's testimony, it would possibly have had some probative value in reinforcing his testimony, but it is doubtful that it would have been admissible in evidence at the behest of the defense. It would have been a prior consistent statement, and those are ordinarily inadmissible in the absence of a claim of recent fabrication or contrivance to give false testimony. See McCormick, *Evidence, supra*, § 49, p. 106.

> not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

The position of respondent and the decision of the court of appeals serve to defeat the ends of justice by allowing a partial presentation of the facts and thereby impeding the ascertainment of truth.[10] The court of appeals' opinion is thus inconsistent with the view of this Court that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op., p. 24.[11]

[10] This is of particular concern in light of the view advanced on at least one occasion that a defense attorney may call a witness to testify although he knows the witness will commit perjury. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

[11] While the increasing professionalism of public defender services is a beneficial development, there is no reason to suppose that defense investigators are more thorough, impartial, or accurate than law enforcement agents or that there is any less need for access to their prior reports to assess the credibility of their testimony. Without in any way impugning the motives of the investigator employed in the instant case or of defense counsel, we think it worth noting that the unreliability of defense investigators has been the subject of judicial comment by several experienced federal trial judges. For example, in *United States* v. *Posey*, D.D.C. Crim. No. 1178-72, affirmed by order, C.A.D.C. No. 73-1379, June 14, 1974, District Judge Pratt denied a request that a rape victim

B. In the Absence of a Recognized Privilege, the Trial Court Had Discretion, as a Part of Its Continuing Responsibility to Rule on Matters of Evidence, to Order Disclosure of Relevant Portions of the Defense Investigator's Report.

1. As the foregoing discussion indicates, the content of the defense investigator's report of the statements made to him by the government witnesses may well have been critical to the jury's determination of

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who had refused to speak to a defense investigator be ordered to do so. He explained the reasons for his ruling as follows (Nov. 3, 1972, Tr. 18): "What you want to do, you want to nail her to the cross. You want to send a Public Defender investigator to interview her, take a statement, not show it to her after she's made it, then put the investigator on the stand, and what comes out of the investigator's mouth may be like nothing she has said. * * * [I]t happens over and over again."

Another case in the District of Columbia, *United States* v. *Matthews*, D.D.C. Crim. No. 319-72, affirmed by order, C.A.D.C., No. 73-1545, March 12, 1974, is strikingly similar factually to the instant case. There, defense counsel made a proffer to the court that the complainant, when interviewed by a Public Defender Service investigator, had stated (I Tr. 32-33): "All Niggers look alike." The complainant denied having made such a statement or having spoken to an investigator at all (I Tr. 31-A), and the investigator later conceded that there was no mention of such an inflammatory statement in his rough notes and that in his final written report he had used only the phrase, "They all look alike," a phrase he had failed even to place in quotation marks (I Tr. 147-148). This retreat by the investigator, after forced disclosure by the trial court of his notes and report, prompted District Judge Gesell to remark (I Tr. 33): "All of my experience has been that the investigators for the Public Defender Service are unreliable, and my only hesitancy is that I have never had one before me that was not shown to be very mistaken and inadequate in his reports, biased and lacking in the kind of requirements expected of an investigating officer."

the credibility of the eyewitness identifications of respondent as one of the robbers. At the heart of this case, therefore, is the proposition recently enunciated by this Court that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, *supra*, slip op. at 24. The public has a right to "every man's evidence," and exceptions to this principle "are not lightly created nor expansively construed, for they are in derogation of the search for truth" (*id.* at 25). In the absence of a recognized privilege shielding disclosure, it follows that a trial court has discretionary power during trial to order a witness or a party to produce for inspection documents in his possession relating to the subject matter of the testimony of the witness at trial.[12]

The decisions of this Court support that view. In *Palermo* v. *United States*, 360 U.S. 343, 353, for example, the Court stated: "Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge * * * subject

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[12] "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins* v. *United States*, 364 U.S. 206, 234 (Frankfurter, J., dissenting, cited with approval in *United States* v. *Nixon*, *supra*, slip op. at 25, n. 18).

to the appropriately limited review of appellate courts." See also *Campbell* v. *United States*, 373 U.S. 487, 493; *United States* v. *Augenblick*, 393 U.S. 348, 355. Thus, in the absence of a controlling statute or rule, this Court has held that the trial judge has wide discretion in matters relating to cross-examination or the production of documents to assist in cross-examination. See, *e.g.*, *Goldman* v. *United States*, 316 U.S. 129, 132; *Gordon* v. *United States*, 344 U.S. 414, 420; *Jencks* v. *United States*, 353 U.S. 657, 669; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400.

While the cited cases were decided in the context of defense requests for government documents or defense cross-examination of a government witness, there is no sound reason why the same principles should not be equally applicable to the right of the government to obtain disclosure for purposes of possible cross-examination (unless production of the document requested is shielded by a privilege or is barred by statute or rule, matters that we discuss in subsequent parts of this brief). What is at stake in considering the prosecution's right to reciprocal production is the vitally important "public's interest in fair trials designed to end in just judgments." *Illinois* v. *Somerville*, 410 U.S. 458, 463, quoting *Wade* v. *Hunter*, 336 U.S. 684, 689.[13]

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[13] While the core issue is one of reciprocity, it should be noted that our position here may be upheld without ruling that the prosecution has a right of disclosure of prior statements of defense witnesses as broad in all respects as that accorded the defense under the Jencks Act (which itself represented a *narrowing* of the traditional inherent powers of trial courts, see *Palermo* v. *United States*, *supra*, 360 U.S. at 361 (Brennan, J., concurring)). The trial court did not order full disclosure of Bond's prior statement, but confined its order to the portion concerning Bond's account of the prior statements of the prosecution witness. This is relatively a special and narrow instance in which disclosure was particularly essential.

Three state courts have had occasion to consider the question of reciprocity. As the Supreme Court of New Jersey observed in *State* v. *Montague*, 55 N.J. 387, 398-399, 262 A.2d 398, 403-404:

> We noted that cross-examination was the most valuable safeguard that had been discovered in the judicial search for truth and that, if cross-examination is to be effective, it must have wide latitude in the testing of the recollection of the witness. * * * While this was said in connection with the testimony of a prosecution witness it applies equally to the testimony of a defense witness. So long as no constitutional privilege is infringed, there is no sensible reason for imposing any restrictions on the cross-examination of defense witnesses beyond those applied to prosecution witnesses. We find no infringement whatever here, for * * * nothing in the Constitution assures to a defendant "a right so to defend as to deny the State a chance to check the truth of his position." * * *

Accord: *People* v. *Damon*, 24 N.Y. 2d 256, 261, 247 N.E. 2d 651, 654, 299 N.Y.S. 2d 830, 834;

People v. *Sanders*, 110 Ill. App. 2d 85, 89, 249 N.E. 2d 124, 126 (1st Dist.).[14]

2. The trial judge is limited in the exercise of his discretion to order production only by the traditional doctrines of relevance and materiality. See *Gordon* v. *United States*, *supra*, 344 U.S. at 420. "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness."

[14] The court in *Montague* noted that applicable court rules contained nothing explicit with respect to the right of the prosecution to obtain production of a prior statement of a defense witness who has actually testified. Its decision rested instead upon "the court's inherent power to order discovery when justice so requires." 55 N.J. at 400, 262 A.2d at 405.

So far as our research discloses, the three cited cases are the only decisions of state appellate courts that have considered the question at issue here. Each of them concluded that, so long as there is no common law or constitutional privilege precluding disclosure of statements of witnesses in the possession of the defense (and each found none), the trial court has inherent authority to order their disclosure. Cf. *Keller* v. *Criminal Court of Marion County*, 16 Crim. L. Rptr. 2155 (Indiana Sup. Ct., October 15, 1974). Indeed, all three of these cases actually go further than the present case, since the disclosure required was not confined to the portion of prior defense witness statements concerning interviews of government witnesses.

The only reported federal decision we know of dealing directly with this issue, besides that of the court of appeals in the instant case, is *United States* v. *Wright*, 489 F.2d 1181 (C.A.D.C.), in which a divided panel of the District of Columbia Circuit held, as did the court below, that it was error for the trial court to have ordered disclosure of an investigator's report.

Jencks v. *United States*, *supra*, 353 U.S. at 669. In deed, depending upon the care and completeness with which it was prepared, the portion of the report that the court ordered disclosed could have turned out to be the weightiest evidence available for assessing the relative credibility of Van Gemeren, Hoffman and Bond; surely, at the time of trial, it was likely to be better evidence than Bond's recollection of what was said at interviews weeks earlier. If the reports were inconsistent with Bond's testimony, the jury should not have been deprived of such highly probative evidence.

Here, the trial court exercised its discretion with care. It limited its disclosure order to those portions of the investigator's report that related to the direct testimony Bond would have given regarding his interviews with Van Gemeren and Hoffman; it indicated that counsel could excise any statements of the defendant before delivering the other relevant portions of the report to the prosecutor; it did not require disclosure until after Bond's direct testimony; and it made clear that its ruling was limited to "the very specific area" of "post testimony discovery" and had nothing whatsoever to do with pretrial discovery (App. 33).[15]

[15] While we believe *United States* v. *Wright*, *supra*, was wrongly decided by the District of Columbia Circuit with respect to this issue, it is significantly distinguishable from the case at bar, for the trial judge in *Wright* did not exercise his discretion with the care shown by the trial judge in the

In sum, the court's disclosure order was limited to that which was relevant and material to the purpose for which respondent chose to call the investigator as a witness, that purpose being the impeachment of two government witnesses by alleged prior inconsistent statements.[16] Absent the existence of a

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instant case. As the dissenting court of appeals judge stated in this case (Pet. App. 23a; emphasis in original):

> (1) [I]n *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than the specific portions relevant only to the impeaching question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. * * * Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

[16] Consideration of the kind of cross-examination to which investigator Bond could properly have been subjected shows that the trial judge had discretion to order production of the report. Specifically, testimony by Bond that Hoffman and Van Gemeren made statements to him subjected Bond to cross-examination as to all the details and circumstances under which these statements were made; the context in which the quoted statements were made; how he remembered these particular statements, especially since he obtained them as

recognized privilege shielding the report, the trial court properly exercised its discretion in ruling that the memorandum of the defense investigator should be disclosed to the prosecutor if the investigator testified about the prior statements of the two key government witnesses.

C. The Trial Court's Disclosure Order was Consistent with the Provisions of the New Federal Rules of Evidence.

1. Rule 613(a) of the Federal Rules of Evidence [17] provides:

> In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request *the same shall be shown or disclosed to opposing counsel.* [Emphasis supplied.]

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part of his job as a professional investigator; the form in which he recorded these statements; and whether he had ever refreshed his memory about these statements from looking at his report.

[17] The Federal Rules of Evidence (Pub. L. 93-595) were signed into law by President Ford on January 2, 1975, and are scheduled to take effect 180 days later, on July 1, 1975. They will apply to all proceedings brought after their effective date, as well as "to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply." Pub. L. 93-595. Thus, if there were to be a new trial in the instant case, the new rules would govern unless the trial is held before July 1 of this year.

By its terms, Rule 613(a) makes mandatory the disclosure to opposing counsel (in this case, the prosecutor) of prior statements made by a witness whenever the attorney examining the witness (here, defense counsel) asks the witness about his prior statements. The purpose of the Rule is to "protect against unwarranted insinuations that a statement has been made when the fact is to the contrary." Advisory Committee Note to Rule 613(a), Fed. R. Evid., 56 F.R.D. at 278. The rule is consonant with the overall purposes of the new Federal Rules of Evidence as articulated by this Court and by Congress: "These rules shall be construed to secure fairness in administration, * * * and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102.

The Rule would require disclosure of the relevant portions of the investigator's report. Respondent's counsel asked Van Gemeren and Hoffman on cross-examination whether the former had told Bond that he only saw the back of the robber identified as respondent and whether the latter had stated that all blacks looked alike. During the testimony of the witnesses, however, respondent's counsel refused to disclose the report prepared by the investigator and purportedly containing prior statements of these witnesses to him.[18] Under Rule 613(a), such refusal

[18] Respondent's counsel initially did make available a portion of a purported statement of Van Gemeren (Defense Exhibit A for identification), but it is unclear from the record whether this disclosure would have been sufficient to satisfy the requirement of Rule 613(a). No disclosure of any kind was made with respect to Hoffman's alleged statement.

would not have been permitted once the question about their prior statements had been asked of government witnesses. (Moreover, Rule 613(b) makes clear that such questioning was a necessary predicate to introduction of extrinsic evidence regarding alleged prior statements of the witnesses.)

Once respondent's counsel had asked Van Gemeren or Hoffman about their statements to Bond, under the new Rule the purported statements necessarily would have had to be "shown or disclosed" to the prosecutor, in order to protect against "unwarranted insinuations" that the statement had been made when the fact may have been to the contrary.[19] The order of the trial court thus reflected the very concerns expressed by the Court and Congress in promulgating Rule 613(a), and the adoption of the Rule lends

[19] Because the witnesses had apparently never read, approved, signed, or adopted Bond's reduction to writing of their statements to him (App. 13-14) it is doubtful that the "statements" would themselves have been admissible as extrinsic evidence of prior inconsistency on the part of Van Gemeren and Hoffman. But the fact that they were not statements of the government witnesses for admissibility purposes is not pertinent to the right of disclosure afforded by Rule 613(a), which is designed to permit opposing counsel to inform and satisfy himself of the basis for undertaking the impeachment.

The statements, if inconsistent with Bond's testimony, would have been admissible as *his* prior statement, but that use does not implicate Rule 613.

further support to the wisdom of the discretionary action of the trial court in this case. See also Rule 106, Fed. R. Evid.[20]

2. Rule 612 of the Federal Rules of Evidence provides in pertinent part:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—
>
> (1) while testifying, or

[20] The evidentiary doctrine of completeness, expressed in Rule 106, dictates that all evidence relating to a given document be made available once that document is used by one of the parties. Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Complete disclosure is favored because the courts have recognized the danger of removing evidence from context and thereby creating a possibly distorted impression as to what the evidence actually reveals. See VII Wigmore, *Evidence*, §§ 2094-2125, p. 466 (3d ed. 1940); McCormick, *Evidence, supra*, § 56, p. 130. Once a part of a statement has been introduced, the adversary has an opportunity to introduce the remainder of the document or testimony, insofar as it is relevant to the subject matter and tends to explain the earlier offered testimony. The policy behind the completeness principle does not differ with reference to documents referred to but not produced at trial. The entire reason for the doctrine is the fair administration of justice, which can only be assured where there is full disclosure. Once Bond testified concerning what was said during the Hoffman and Van Gemeren interviews, the prosecution would have been entitled to verify the content of the statements or offer the balance of the statements into evidence.

> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. * * *

This new Rule thus incorporates the Jencks Act's production rationale and recognizes it as a two-way street, making prior statements available to the opposing party for purposes of cross-examination after the direct examination of the witness. The Advisory Committee's Note demonstrates the Rule's intended application to a situation such as that presented in the instant case (56 F.R.D. at 277):

> The purpose of the rule is the same as that of the *Jencks* statute, 18 U.S.C. § 3500: *to promote the search of credibility and memory.* The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute * * *. With this limitation in mind, some differences of application may be noted. The Jencks statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. *The statute applies only to government witnesses; the rule applies*

to all witnesses. The statute contains no requirement that the statement be consulted for purpose of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures make this of no importance. [Emphasis supplied and citations omitted.]

This Rule would have required production at trial, for purposes of cross-examination of Bond, of the relevant portions of Bond's notes, assuming that Bond had used the notes to refresh his recollection. Respondent's counsel sought to impeach the credibility of Van Gemeren and Hoffman by offering Bond's testimony about prior statements purportedly made to him by those witnesses and recorded by him in a written report.[21] The district court ruled that if the investigator testified about prior statements, the

[21] The fact that the alleged prior statements were included in Bond's written report is not in dispute, as the following colloquy indicates (App. 35):

> THE COURT. For the record, your offer of proof, does it include the fact that Mr. Bond did in this particular case, with these two witnesses, prepare notes during the time he made his interview with these witnesses and then subsequently reduced them to a written report; is that correct, Mr. Allis?
>
> MR. ALLIS. That is correct. It is not in the offer of proof but that is what he did.
>
> THE COURT. And that, of course, is what we have been talking about when we were talking about a portion of the report being turned over to the government after the completion of Mr. Bond's testimony, I assume.

government could inspect that portion of the investigator's report relating to the statements made to him by the witnesses (after the court had first examined the memorandum, *in camera* if necessary, to excise any extraneous matter). Otherwise, the court ruled, the investigator could not testify about these alleged statements.

Because respondent did not produce the report and was thus not permitted to elicit such testimony from the investigator, we do not know whether Bond would have found it necessary to refresh his recollection while testifying. Had he done so, of course, the prosecutor would have been entitled to inspect the report, both under Rule 612 (if the case had been tried after the effective date of the Federal Rules of Evidence) and under traditional rules of evidence. See *e.g.*, McCormick, *Evidence*, *supra*, § 9, pp. 17-18;[22] *United*

[22] McCormick has explained the purpose of this evidentiary rule as follows (*ibid.*):

> The second safeguard is the rule which entitles the adverse party, when the witness seeks to resort to the memorandum, to inspect the memorandum so that he may object to its use if ground appears, and to have the memorandum available for his reference in cross-examining the witness. With the memorandum before him, the cross-examiner has a good opportunity to test the credibility of the witness's claim that his memory has been revived, and to search out any discrepancies between the writing and the testimony. This right to demand inspection has usually been limited to writings used by the witness on the stand, but the reasons seem equally applicable to writings used by the witness to refresh his memory before he testifies. Doubtless the courts have thought that to require inspection of such papers may

States v. *Wright*, 489 F. 2d 1181, 1188-1189 (C.A. D.C.). If Bond refreshed his recollection by reviewing his report *before* testifying, it would have been in the court's discretion under Rule 612 to order production. While the court of appeals here stated that there "is nothing in the record to suggest Bond used his reports to refresh his recollection" (Pet. App. 14a, n. 4), there is nothing to suggest that he had not done so. Indeed, as the dissenting judge stated, the fair inference is that Bond did in fact refresh his recollection by reviewing his report (Pet. App. 21a-22a):

> The record is clear that defense counsel had the Bond statement on his desk and was utilizing it in connection with the cross-examination of Hoffman. If the trial had followed the customary course and Bond had taken the witness stand, without the preliminary discussions and the court's advisory ruling on the production of the statement, Bond, no doubt, would have said that he used the statement to refresh his memory. For that matter, the record of the proceedings necessarily points to this conclusion. Additionally, there was nothing amateurish about defense counsel's performance and it would be doing him a great injustice to assume that he did not properly prepare the witness by having him read the memorandum.

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unduly encourage prying into the opponent's file, but increasingly, the decisions reflect the view that there is a public interest in the full disclosure of the source of a witness's testimony. [Footnotes omitted.]

From the record in this case, it is fair to assume that had Bond testified about his interviews with Van Gemeren and Hoffman, the prosecutor in cross-examination would have asked Bond whether he had refreshed his recollection by reviewing his report before testifying. If Bond responded that he had, the relevant portions of the report would have been producible under Rule 612 in the discretion of the court, and the district court undoubtedly would have exercised its discretion under the Rule to order production "in the interests of justice" (just as it did here in the exercise of its inherent discretion absent a rule or statute). Thus the prosecutor would have been permitted to inspect the report, to cross-examine the witness about it, and to introduce in evidence those portions relating to Bond's testimony.[23]

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[23] It is, of course, theoretically possible that Bond never examined the report to refresh his recollection and would have testified without ever doing so. As a professional investigator who interviews large numbers of persons for a busy public defender's office, it seems unlikely that Bond would be able to give reliable testimony without reviewing his report, which was prepared several weeks and, presumably, many interviews before the time of trial. In any event, it seems hard to imagine any legitimate purpose that could be served by a deliberate refusal of a defense investigator to refresh his recollection from his report prior to testifying, and, in an appropriate case, we think a trial court might have inherent power to demand that the investigator refresh his recollection as a precondition to testifying.

Moreover, while Rule 612 itself would not specifically authorize production of prior written statements not used to refresh recollection, it is by no means clear that it was intended to extinguish the court's inherent power, apart from

II. THE INVESTIGATOR'S REPORT WAS NOT PROTECTED FROM DISCLOSURE BY RESPONDENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The court of appeals concluded that the trial court's order requiring disclosure of relevant portions of the defense investigator's report as a condition of Bond's testifying about his interviews with Van Gemeren and Hoffman violated respondent's Fifth Amendment privilege against compelled self-incrimination. The precise analytical basis for the court's decision is not clear, and the opinion does not adduce any substantial body of precedent supporting the conclusion it reached, either directly or by analogy.

The Fifth Amendment privilege against self-incrimination does not sustain the court's result. The portions of the investigator's report ordered disclosed are not the kind of material within the ambit of the privilege, being neither personal to the defendant nor testimonial in nature. Moreover, because the court's order did not require any disclosure unless and until respondent himself chose to call the investigator as a witness, it involved no compulsion in the Fifth Amendment sense. Finally, even if the material were otherwise within the privilege, the privilege was waived when the defense elected to seek to prove the making of prior inconsistent statements by offering the investigator as a witness.

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specific enabling rule, to require production in particular cases, such as this, in which the statement is manifestly likely to have great materiality in assessing the credibility of the witness's trial testimony.

A. Because The Privilege Against Compulsory Self-Incrimination is a Personal One Relating To The Personal Knowledge and Private Papers Of The Accused, It Does Not Extend To The Investigator's Report.

By investing Bond's reports describing his interviews of government witnesses with the status of materials protected by respondent's privilege against compulsory self-incrimination, the court of appeals overlooked the essential attributes that must exist in order for such protection to be properly recognized. "By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch* v. *United States*, 409 U.S. 322, 327. "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." *Id.* at 328 (emphasis in original). See also *Bellis* v. *United States*, 417 U.S. 85, 90.

Respondent did not prepare Bond's report, nor is it suggested that the portions ordered disclosed in any way reflected information or ideas of the respondent. There was, in short, nothing personal to respondent in this material, and compelled its disclosure thus would not infringe his privilege. As the New York Court of Appeals stated in upholding a similar disclosure requirement in *People* v. *Damon*, *supra*, 24 N.Y. 2d at 261, 247 N.E. 2d at 654, 299 N.Y.S. 2d at 834:

These statements were not those of the defendant but of witnesses offered by the defendant. In no sense can it be said that he is being compelled to produce incriminating statements of his own. The privilege against self incrimination applies only to evidence of a testimonial or communicative nature obtained from the defendant himself (*Schmerber* v. *California*, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908; see, also, *Jones* v. *Superior Ct. of Nevada County*, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919, 96 A.L.R. 2d 1213; Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. Rev. 228, 246 n.; Note, 76 Harv. L. Rev. 838). We have recognized the defendant's right to obtain and inspect statements of prosecution witnesses for possible use in cross-examining them (see *People* v. *Rosario*, 9 N.Y.2d 286, 213 N.Y.S. 2d 448, 173 N.E. 2d 881, 7 A.L.R.3d 174). There is neither reason nor justification for not allowing the People to procure from the defendant statements taken from his witnesses for the same purpose of cross-examining them. [Footnote omitted.]

The report does not become personal in the constitutional sense simply because it was prepared by respondent's agents for purposes of his trial or because it was in the physical possession of his agents at the time of trial. The content and character of the material involved is still the analytic touchstone. "The distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical

evidence' does not violate it." *Schmerber* v. *California*, 384 U.S. 757, 764.

It might be argued that the matter in question here —portions of a written report relating to witness interviews—is "testimonial" in character and thus is protected under the *Schmerber* distinction. While this contention might have substance as applied to a claim of privilege by Bond, the report cannot be considered "testimonial" in connection with respondent's claim. At the time this Court first held that the privilege could attach to documents as well as to oral testimony, it referred to "forcible and compulsory extortion of a man's own testimony or of his *private* papers to be used as evidence to convict him of crime * * *." *Boyd* v. *United States*, 116 U.S. 616, 630 (emphasis supplied). See also *United States* v. *White*, 322 U.S. 694, 698 ("The constitutional privilege against self-incrimination * * * is designed to prevent the use of legal process * * * to force [the accused] to produce and authenticate any *personal* documents or effects that might incriminate him.") (emphasis supplied); *Bellis* v. *United States*, *supra*.

For purposes of evaluating respondent's claim of privilege, the investigator's written report is not materially different from a tape recording of the interviews or from purely physical evidence that may have been uncovered by Bond in the course of the investigation. Not being personal to respondent or "testimonial" from him, it is not cloaked with the protection afforded by his privilege against self-incrimination.

B. Even If the Self-Incrimination Privilege Applied To The Investigator's Report, Respondent Was Not "Compelled" To Disclose Its Contents In Any Constitutionally Impermissible Sense; Rather, He Would Have Waived Whatever Privilege He May Otherwise Have Enjoyed By Electing To Call The Investigator To The Stand.

Even if Bond's reports of his interviews of Van Gemeren and Hoffman, although in no sense personal to respondent, were considered to fall within the scope of his compulsory self-incrimination privilege, the trial court's order conditioning Bond's testimony regarding those interviews on disclosure of the pertinent portions of the reports did not impermissibly infringe on the privilege. The reports were not available to the prosecution for use during its case in chief or, indeed, at any time thereafter, save if respondent himself elected to seek to prove prior inconsistent statements of the government witnesses by putting Bond on the stand to testify thereto.

1. The command of the Fifth Amendment is that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *." Although the privilege against self-incrimination thus protects against compelled testimony, it does not allow a defendant who chooses to testify in a criminal trial to shield his own testimony, or that of one of the witnesses whom he calls to testify in his behalf, against the "traditional truth-testing devices of the adversary process" (*Harris* v. *New York*, 401 U.S. 222, 225-226), including the risk of confrontation with prior inconsistent statements. This consequence has never

been considered to be "extortion of information from the accused himself that offends our sense of justice." *Couch* v. *United States*, *supra*, 409 U.S. at 328; see also *Bellis* v. *United States*, *supra*, 417 U.S. at 91; *Malloy* v. *Hogan*, 378 U.S. 1, 8; *Ullman* v. *United States*, 350 U.S. 422, 428; *Brown* v. *Walker*, 161 U.S. 591, 600; *Feldman* v. *United States*, 322 U.S. 487, 500 (Black, J., dissenting).

Accordingly, it was proper for the trial court to condition presentation of Bond's testimony upon disclosure of the pertinent portions of the report. The trial court's order may have had adverse consequences for respondent in the presentation of his case, but the primary consequence was nothing more than a strategic choice whether to offer the investigator's testimony at trial, on the condition that his report be disclosed, or to forego the introduction of such testimony. This consequence does not amount to "compulsion" in the sense relevant for bringing the protection of the self-incrimination provision into play. Cf. *McGautha* v. *California*, 402 U.S. 183, 213.

While the order of the trial court posed a choice for respondent—perhaps even a difficult choice—the choice was his freely to make as a matter of trial strategy; the court's order did not create the kind of compulsion "likely to exert such pressure upon an individual as to disable him from making a free and rational choice" (*Garrity* v. *New Jersey*, 385 U.S. 493, 497), and therefore does not implicate the Fifth Amendment. As this Court stated in *McGautha* v. *California*, 402 U.S. 183, 213, in upholding the va-

lidity of a unitary trial procedure in a capital case, under which the defendant could not testify in mitigation of punishment without exposing himself to questioning on the issue of guilt or innocence:

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. *McMann* v. *Richardson*, 397 U.S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Equally pertinent is *Williams* v. *Florida*, 399 U.S. 78, in which the Court upheld a notice-of-alibi rule that conditioned the accused's right to put on an alibi defense on pretrial disclosure of the names of alibi witnesses. In rejecting the assertion that this rule impermissibly burdened the exercise of the privilege against compulsory self-incrimination, the Court stated (399 U.S. at 83-84):

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That

> the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Cf. *Wardius* v. *Oregon*, 412 U.S. 470, 474.

In the present case, accordingly, there was no infringement of the privilege when respondent voluntarily elected not to disclose the investigator's report.

2. Another side of the same coin is the recognized principle that a defendant who elects to take the stand or raise a particular matter in his defense places himself in a fundamentally different position from one who does not. He subjects himself to a requirement of completeness. Once on the witness stand, for example, the defendant is subject like any other witness to cross-examination designed to assure the reliability of his testimony. By choosing to tell his side of the story to the jury, he waives his Fifth Amendment privilege not only as to the part of the story that he wishes the jury to hear, but as to the *whole* story.

"[A] defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, *supra*, 402 U.S. at 215. See also VIII Wigmore, *Evidence* § 2276, p. 459 (McNaughton rev. 1961). "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel* v. *United*

States, 271 U.S. 494, 497. And, "[i]t is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination." *McGautha* v. *California*, *supra*, 402 U.S. at 215.

The underlying rationale for these principles was set forth in Mr. Justice Frankfurter's opinion for the Court in *Brown* v. *United States*, 356 U.S. 148, 155-156:

> * * * [W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. * * * The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. * * *

In sum, "[t]he safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel* v. *United States*, *supra*, 271 U.S. at 499. The privilege "cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris* v. *New York*, *supra*, 401 U.S. at 226; see also *Walder* v. *United States*, 347 U.S. 62, 65.

These established principles apply with even greater force to a witness offered on behalf of a defendant than they do to the accused himself, for an accused can have no greater right to shield a witness whom he calls from cross-examination by invoking his personal privilege than he has to shield his own testimony. Moreover, there is sound policy in requiring a defendant who offers a witness—whether himself or another testifying in his behalf—to do so without reservation and in allowing the prosecution to probe all seemingly questionable aspects relevant to the witness's testimony, including through the production of interviews or reports prepared by the witness.

Whether the defendant takes the stand himself or has another give testimony on his behalf, he benefits from the opportunity to tell the jury his side of the story. The fair balance of advantages requires

that the jury have an opportunity to hear the entire story—including the cross-examination of the witness based on any of his prior interviews or reports. As the dissenting judge stated in this case (Pet. App. 22a):

> * * * In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.

Finally, the Fifth Amendment privilege is available only with respect to material that may tend to incriminate. In the context of the narrow disclosure that would have been required in the instant case, the possibility of incrimination—insofar as we can imagine without having seen the report—could arise only to the extent that Bond's report would be inconsistent with his testimony. Since the privilege is applicable, if at all, only to the extent that the written report of the interviews conflicts with the oral testimony, the need for adherence to the principle of waiver and the requirement of completeness, discussed above, are brought into clear focus.

C. The Analysis Of The Court Of Appeals And The Cases Upon Which It Relied Do Not Support Its Conclusion.

The court of appeals began its discussion of the privilege against self-incrimination by noting that in 1966 Justices Black and Douglas had dissented from the promulgation by the Court of amendments to Rule 16 of the Federal Rules of Criminal Procedure because of concern about their possible conflict with the Fifth Amendment privilege (Pet. App. 9a). It then proceeded to a discussion of the opinions of the California Supreme Court in *Prudhomme* v. *Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129, and of Judge Pollack in *United States* v. *Fratello*, 44 F.R.D. 444 (S.D.N.Y.). While acknowledging that both cases dealt with pretrial discovery and concerned "conditioning defense discovery upon the possibility of enhancing the government's case in chief" (Pet. App. 12a), and that the decisions antedated this Court's opinion in *Williams* v. *Florida*, 399 U.S. 78, the court of appeals "nevertheless, conclude[d] that the fifth amendment remains relevant in the instant circumstances" (Pet. App. 12a).

On this premise, it then considered the opinion of the District of Columbia Circuit in *United States* v. *Wright*, *supra*, referred approvingly to that court's concept that "criminal discovery must inevitably remain basically a one-way street" (Pet. App. 13a), and concluded by announcing its agreement with the following language from the *Wright* opinion (Pet. App. 14a):

> The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution against the accused. [*United States* v. *Wright*, *supra*, 489 F.2d at 1195.]

None of these authorities fairly supports the result in the instant case.

1. Rule 16 involves provisions for pretrial discovery of certain materials that the defense intends to rely upon at trial. The concerns voiced by Justices Black and Douglas in the statements quoted by the court of appeals have largely been dissipated by the decision in *Williams* v. *Florida*, *supra*, upholding the "notice of alibi" requirement. See also *Wardius* v. *Oregon*, *supra*.

Moreover, it does make a material difference that the concern upon which those Justices focused and that prompted the decisions in *Prudhomme* and *Fratello* was pretrial discovery and not in-trial disclosure. The prosecution's pretrial discovery requests were deemed improper in *Prudhomme* because disclosure at that time "might lighten the prosecution's burden of proving its case in chief" (2 Cal. 3d at 326, 466 P. 2d at 677, 85 Cal. Rptr. at 133), and "might serve as a link in a chain of evidence tending to establish [the defendant's] guilt of a criminal offense" (2 Cal. 3d at 327, 466 P. 2d at 677-678, 85 Cal. Rptr. at 133-134), and in *Fratello* because "the documents sought from the defendants are required by the government as a part of its prima facie case" (44 F.R.D. at 449). Both cases took pains to distinguish the situation in which the defendant elected to take the stand at trial and open up a subject, recognizing the need for full inquiry and thorough cross-examination in such circumstances (2 Cal. 3d at 325, 466 P. 2d at 676, 85 Cal. Rptr. at 132; 44 F.R.D. at 448).

The inapplicability of *Prudhomme* and *Fratello* to the problem presented in this case is apparent. We are not here concerned with pretrial discovery of evidence the defense intends to offer at trial, nor are we concerned with disclosure of evidence by the defense before the government has made out a prima facie case. The issue is the right of the government to inspect relevant portions of a defense investigator's report after the government has put in its entire case in chief and has withstood a motion for judgment of acquittal and after the accused has voluntarily elected to offer the investigator as a witness in his defense. At that point, disclosure of the report can hardly be said "to lighten the prosecution's burden of proving its case in chief" or to serve as a "link in a chain of evidence tending to establish * * * guilt."

Rather, as when the defendant himself chooses to testify (a situation recognized by the courts in *Prudhomme* and *Fratello* as entirely different from dis-

closure before trial), the decision to offer a witness in one's behalf subjects that witness to cross-examination about relevant matters. It would be unfair to allow him to testify without being cross-examined, and it cannot be argued on the basis of *Prudhomme* and *Fratello* that disclosure of his report at that point is an improper impingement on his Fifth Amendment privilege.

2. Unlike *Prudhomme* and *Fratello*, the decision of the District of Columbia Circuit in *United States* v. *Wright*, *supra*, did deal with a factual situation like that presented by this case. However, *Wright's* discussion of Fifth Amendment principles does not appear to have been the basis for decision in that case: its conclusion seems instead to turn on the overbreadth of the trial court's order and the fact that the investigator there did not use his report to refresh his recollection while on the stand. To the extent that the Fifth Amendment was found to be implicated in *Wright*, the analysis of the court there was as unpersuasive, we submit, as was the analysis here.

Of the various values fostered by the privilege against self-incrimination, the courts both below and in *Wright* appear to have focused upon that described in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55, as "our preference for an accusatorial rather than an inquisitorial system of criminal justice" and the concomitant requirement that "the government in its contest with the individual * * * shoulder the entire load," or, as the court put it in *Wright*, the

precept that the state must "investigate its own case, find its own evidence, and prove its own facts" (489 F. 2d at 1195).

Because of the timing of the court's disclosure order and its limited nature, however, we submit that there is no validity to these concerns in the context of this case. The trial court made clear that before the defense investigator's report would have to be disclosed, the government first must have put in its entire case in chief and withstood a motion for judgment of acquittal; the defense must have chosen to put on a defense and have opted for the tactic of offering the investigator to testify about the prior statements made to him by government witnesses; and the defense must have completed its direct examination of the investigator. The court stated (App. 25): "So the Court is not going to order the disclosure of any investigative reports until the investigator has taken the stand, testified in full and related, if he does, the allegedly impeaching statement."

Disclosure of the relevant portions of the investigator's report at that point would in no way alter the character of our accusatorial system or lift the burden of proof from the government's shoulders, for the government necessarily would have completed its investigation and proved its own facts in its case in chief. Moreover, since the trial court was prepared to examine the report *in camera* and excise irrelevant portions before disclosing it to the prosecutor, the government would receive no windfall of addi-

tional evidence that would assist it in refuting other aspects of the defense case, as occurred in *Wright*.

In sum, the order of the trial court, limited in scope and requiring production only after the direct examination of Bond, would merely have permitted the prosecution more effectively to use the "traditional truth-testing devices of the adversary process" in its cross-examination of Bond. *Harris* v. *New York*, *supra*, 401 U.S. at 225. The accusatorial system of justice is not compromised merely because respondent's decision to offer the investigator as a witness in his behalf requires the disclosure of the investigator's report, which in turn "may open the door to otherwise inadmissible evidence which is damaging to his case." *McGautha* v. *California*, *supra*, 402 U.S. at 213.

III. PORTIONS OF WRITTEN INVESTIGATIVE REPORTS REFLECTING STATEMENTS OF GOVERNMENT WITNESSES INTERVIEWED BY A DEFENSE INVESTIGATOR ARE NOT PROTECTED BY RULE 16 OR THE JENCKS ACT FROM DISCLOSURE DURING TRIAL FOR IMPEACHMENT PURPOSES.

The court of appeals also examined the district court's production order from the perspective of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act (18 U.S.C. 3500), and, after quoting both extensively, concluded its analysis as follows (Pet. App. 17a; emphasis in original):

> Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c) [of Rule 16, which governs discovery by the government]. We would conclude that the work product of defense is inviolable under these circumstances. [Footnote omitted.]

This passage, we submit, reflects an erroneous understanding of Rule 16 and the Jencks Act.

Subsection (c) of Rule 16, on which the court relied, permits the trial court to condition a defendant's discovery against the government by requiring the defendant to allow the prosecution to inspect and copy books, papers, documents and other tangible objects in the defendant's possession or control "which the defendant intends to produce at the trial * * *." Under this reciprocal discovery provision, the government is generally given access to the same kind of material that the defendant can discover from the government. However, since the Jencks Act, 18 U.S.C. 3500, prevents a defendant from discovering statements of government witnesses prior to trial, Rule 16(c) likewise limits the scope of the government's pretrial discovery by exempting from pretrial disclosure statements of government or defense witnesses to the defendant, his attorney or agents.[24]

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[24] Rule 16(c) also has a separate "work product" exception. The Rule does not authorize "the discovery or inspection of

It is difficult to see how any of this bears on the issue in this case. We do not rely upon the affirmative authorization in Rule 16(c) as a basis for the trial court's production order, for the quite apparent reasons that the question here is not one of reciprocal discovery, the portions of the report do not comprise material the defendant "intends to produce at the trial," and the case is not in any event concerned with pretrial discovery procedures. It therefore matters not that, had respondent sought pretrial discovery from the government and had he intended to produce the report at trial, nevertheless the government could not have discovered it through a Rule 16(c) reciprocal discovery order because of the exception for this type of material.

While the court below did say that "Rule 16 has relevance to discovery *during* trial" (Pet. App. 17a; emphasis in original) (a statement with which we disagree), it could hardly have meant that the Rule governs in-trial production of material by the defense. The affirmative portion of Rule 16(c) pertains only to material the defendant "intends to produce at the trial"; there is nothing in the language or history of Rule 16 in general or Rule 16(c) in particular to indicate that it relates in any way to trial practice. Indeed, it would be rather strange to have a rule that

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reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case * * *." Similarly, under Rule 16(b), the defense may not discover the "work product" of the government.

required a defendant to produce at trial only what he intends to produce.[25]

The point is that once the trial has commenced the function of Rule 16 is ended. See Advisory Committee Note to Rule 16, Fed. R. Crim. P., 18 U.S.C. App., pp. 4493-4494.[26] While the Rule itself does

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[25] We do not read the opinion of the court of appeals as attributing any separate significance to the Jencks Act (18 U.S.C. 3500) other than the fact that Rule 16(b) refers to it. By its terms, that Act is limited to disclosure to the defense, "[a]fter a witness called by the United States has testified on direct examination," of "statement[s] or report[s] in the possession of the United States which [were] made by a Government witness or prospective Government witness (other than the defendant) * * *." 18 U.S.C. 3500(a), (b). Respondent can derive no solace from the fact that the Act makes not the slightest reference to disclosure to the prosecutor of statements or reports in the possession of the defense. Such omission is hardly surprising, since the purpose of the Jencks Act was to limit the right of the defense to the production of statements of government witnesses—production that courts previously could and did order in the exercise of their inherent discretion. S. Rep. No. 981, 85th Cong., 1st Sess., pp. 2-4. See also *Palermo* v. *United States*, 360 U.S. 343, 361 (Brennan, J., concurring).

[26] The commentators are in agreement that Rule 16 is directed only at the pretrial situation. See, *e.g.*, Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1279, 1282 n. 19 (1966); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. Rev. 437, 494-514 (1972); Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 Harv. L. Rev. 994 (1972). As Mr. Justice Fortas stated in his concurring opinion in *Giles* v. *Maryland*, 386 U.S. 66, 101:

> On its face, the Rule is directed to the relatively limited problem of *pretrial* discovery and inspection in the federal courts. [Emphasis in original.]

not expressly use the term "pre-trial discovery," subsection (f) provides that a "motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit" and that the "motion shall include all relief sought under this rule." Moreover, the 1966 Advisory Committee Note observes that the "extent to which *pretrial discovery* should be permitted in criminal cases is a complex and controversial issue," and states that the "rule has been revised to expand the scope of *pretrial discovery*." 18 U.S.C. App., pp. 4493-4494 (emphasis supplied).[27]

Subsections (b) and (c) neither authorize nor preclude the in-trial production or use of witnesses' statements for impeachment purposes.[28] Subsection (b) merely emphasizes that the Rule does not provide for discovery of statements of government witnesses and that the federal criminal process only requires such production "as provided in 18 U.S.C. § 3500," the Jencks Act. Of course, there was no reason for inserting a comparable provision in subsection (c), the reciprocal discovery provision, since no congressional enactment comparable to the Jencks Act

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[27] The proposed amendments to Rule 16 now pending in Congress reflect a continuing intention that Rule 16 govern only pretrial discovery. See Advisory Committee Note to Proposed Rule 16, Fed. R. Crim. P., 62 F.R.D. 309, 313, 314.

[28] The proposed amendments to Rule 16 would provide for reciprocal discovery before trial of names and addresses of witnesses but would not authorize pre-trial disclosure of ~~witnesses but would not authorize pretrial disclosure of~~ (2), (b)(1)(C), and (b)(2), Fed. R. Crim. P., 62 F.R.D. 305-306.

witnesses' statements. See Proposed Rule 16(a)(1)(E), (a)

limits the scope of production of defense witness statements.[29]

Rule 16 thus has no bearing on the question of in-trial production of the defense investigator's report at issue here. That is a separate evidentiary question, governed not by rule, but traditionally by

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[29] Even if Rule 16(c)'s exemption clause expresses some general federal policy against requiring the production of a defendant's "work product" material at trial as well as before, the portions of the report ordered to be produced here do not fit within that category. The basic purpose of the work product rule is to protect the privacy of the attorney during his preparation for trial; the rule is thus intended only to protect "trial preparation materials" from inquiries that might disclose the mental processes of counsel, including trial strategy, legal opinions or conclusions, and the like. See McCormick, *Evidence*, § 96, p. 207.

But statements of witnesses—the essence of what was ordered produced here—do not reflect such mental processes. These were exempted from pretrial discovery by the government in Rule 16(c) not because of any "work product" rule but in order to put the defense on an even footing with the prosecution which, under the Jencks Act, would not have to turn over its witnesses' statements until trial. Once the trial has begun, however, the policy underlying the exemption no longer applies. If anything, the even-footing rationale supports our position, since it is clear that, had the report in question here been made by a government agent, it would have had to be supplied to the defense.

In discussing the work product exemption in Rule 16, the court of appeals relied on the intermediate New Jersey appellate court decision in *State* v. *Montague*, 101 N.J. Super. 483, 244 A. 2d 699, which characterized interview notes as work product of the defense attorney (Pet. App. 16a, n. 5). However, this analysis has been rejected by the State's highest court in *Montague*, which modified the decision relied upon by the court of appeals. See pp. 31-32 and n. 14, *supra*.

the discretion of the trial judge to regulate and control the scope of cross-examination at trial.[30]

Thus, since there is no federal statute or rule concerning in-trial production by the defense of the kind of material at issue here, the "[f]inal decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge * * *." *Palermo* v. *United States, supra,* 360 U.S. at 353.[31] For, "[i]n the absence of specific legislation, questions of this nature are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'" *Gordon* v. *United States,* 344 U.S. 414, 418 (citing *Funk* v. *United States,* 290 U.S. 371, and Rule 26, Fed. R. Crim. P.); see also Fed. R. Evid. 501.[32]

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[30] While the correct characterization of disclosure as discovery or evidentiary in nature is not always clear, the production of statements and reports during trial is governed by the rules of evidence. For example, in a case involving the non-production of possible Jencks Act material, Mr. Justice Douglas noted in an opinion for a unanimous Court:

> [O]ur *Jencks* decision and the Jencks Act were not cast in constitutional terms. * * * They state rules of evidence governing trials before federal tribunals * * *. [*United States* v. *Augenblick,* 393 U.S. 348, 356.]

[31] The inherent power of the courts to fashion rules of evidence was well illustrated in the *Jencks* case itself, for the rule announced there was not based on any statute or codified rule. See *Jencks* v. *United States, supra,* 353 U.S. at 668; *Palermo* v. *United States, supra,* 360 U.S. at 345-346.

[32] Rule 17(c) of the Federal Rules of Criminal Procedure, which authorizes the issuance of a subpoena *duces tecum,* is

As the dissenting judge correctly noted in this case (Pet. App. 24a):

> As repeatedly stated by the trial judge, we are not here concerned with the Jencks Act, 18 U.S.C. § 3500, or with Rule 16, F.R.Crim.P. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment.

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available to the government "subject, of course, to such limitations as are imposed by the Fourth and Fifth Amendments." 1 Wright, *Federal Practice and Procedure,* § 274, p. 549 (1969). Of course, if there is no such prohibition on production of the report here, the government could subpoena the defense investigator to testify and produce those portions of the report during the government's rebuttal. To that extent, the court's production order involved merely a matter of timing, since the court reasonably concluded that it would be more appropriate for the material to be produced and used as a basis for cross-examination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court of appeals should be reversed.

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